DOCUMENT RESUME

ED 098 956 IR 001 335

AUTHOR Danna, Sammy R.
TITLE The Save-WEFM Case as Reported to the 50th Annual NAEB Convention, 1974.
INSTITUTION Loyola Univ., Chicago, Ill.
PUB DATE 20 Nov 74
NOTE 12p.; Paper presented at the National Association of Educational Broadcasters Annual Convention (50th, Las Vegas, Nevada, November 17-20, 1974)

EDRS PRICE MF-$0.75 HC-$1.50 PLUS POSTAGE
DESCRIPTORS *Community Action; *Programing (Broadcast); *Radio
IDENTIFIERS Citizens Committee to Save WEFM; *WEFM; Zenith Radio Corporation

ABSTRACT

The history of Chicago FM radio station WEFM and the activities of the Citizen's Committee to Save WEFM are chronicled. The focus is principally on the actions of the Citizen's Committee to prevent the conversion of the radio station from a classical music format to rock and roll offerings and to block the sale of the station by Zenith to GCC Corp. The legal battles in this fight are described. (WH)

BEST COPY AVAILABLE

ED 098956

THE SAVE-WEFM CASE AS REPORTED TO THE 50TH ANNUAL NAEB CONVENTION, 1974

BY

SAMMY R. DANNA, PH.D.

Loyola University of Chicago

November 20, 1974

THIS IS A PAPER PRESENTED TO THE INDIVIDUALS ATTENDING THE BROADCAST EDUCATORS IN ACTION ON BEHALF OF LISTENERS AND VIEWERS SESSION, 50th NAEB CONVENTION IN LAS VEGAS, ON NOVEMBER 20, 1974.

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION
THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

IR 001 335

BEST COPY AVAILABLE

THE SAVE-WEFM CASE AS REPORTED TO THE 50TH ANNUAL NAEB CONVENTION, 1974

BY SAMMY R. DANNA, LOYOLA UNIVERSITY OF CHICAGO

INTRODUCTION

WEFM is a classical music FM station, founded and operated by Zenith Radio Corporation of Chicago, from 1940 to its sale to GCC Communications on January 10, 1973. In the spring of 1972, rumor of the impending sale and proposed classical music format change to rock and roll offerings was widespread throughout Chicago. When rumor became fact in April, 1972, various citizens began protesting the proposed format change; some passed literature concerning the situation, while still others offered sheets for signing formal protests to the Federal Communications Commission. Soon, it was realized that a unified effort had to be obtained in order to meet the formidable forces and financial resources of GCC and Zenith (not to mention possible FCC opposition). The most active protesters created what became known (at my formal suggestion):"Citizens Committee to Save WEFM, Inc." This not-for-profit Illinois chartered corporation was formed to provide legal and other services to keep WEFM a classical music station, permanently.

I became a founding member of the Citizens Committee and have been on the Board of Directors since the charter was signed in the summer of 1972. Harry Booth, a public-spirited lawyer in Chicago, provided all of our legal services until joined by attorneys Richard Watt and Thomas Allison in early 1973. Verson Boerman, a suburban high school English teacher, has been President of the organization while Dorothy Ryan, a Chicago Loop business-woman, has served as Vice-President. I have been officially designated Chronicler of events in the case, and I am writing a book on such, recording in prose form events as they occur (a chronological-order work as opposed to, perhaps, a subject-order one). I have also done research for legal presentations to the FCC and U.S. Court of Appeals documents as well as other special papers for the Citizens Committee upon request. A sister-organization has been chartered under Illinois not-for-profit laws, "Chicago Fine Arts Broadcasting Association;" this group-with me as Acting Chairman-hopes, if feasible, to take over and operate WEFM as a serious music station. This would be on a permanent basis, of course, and would be under the direction and joint ownership of several major Chicago universities and the Chicago Public Library. Dr. Donald Bogue of the University of Chicago pressed hard for creation of the Fine Arts group, and he has also contributed heavily by publishing a monumental survey, showing the need and value of WEFM as a classical music outlet.

Some background to WEFM, prior to its finalized sale to GCC on January 10, 1973, is in order. WEFM began experimental broadcasting on February 2, 1940 as W9XEN, becoming W51C on March 31, 1941; for the first time the station was licensed as a commercial outlet, twice again changing call letters: November 1, 1943 from W51C to WWZR and August 1, 1946 from WWZR to the present WEFM. (Note the odd call letters W51C, an experimental undertaking in the early 1940's.) WEFM was really a means for Zenith to experiment with developing better FM broadcasting and reception in the 1940's and 1950's. In fact, in the early days FM's inventor, Edwin Armstrong, came to Chicago to work with Zenith on some of these technical experiments. WEFM worked on perfecting true high fidelity in FM broadcasting and it was WEFM which introduced (with GE's Schnectady FM station) two-channel multiplex stereophonic broadcasting on June 1, 1961. Zenith used experimental FM station KS2XFJ, along with WEFM for various experiments in perfecting multiplex FM stereo during the

BEST COPY AVAILABLE

1950's and early 1960's.

WEFM originally broadcast classical music and continued this through the years, helping to make FM broadcasting synonomous with good (background) and serious (classical) music, a distinction generally held in FM until recent years when the erosion of AM-type formats have caused unfortunate similarities bwtween FM and AM programming offerings. From 1940 to 1965, Zenith did not solicit advertising for WEFM although it was a commercially licensed station since 1941, the year commercial FM joined commercial TV to enter American broadcasting. Then, in 1966, Zenith felt that competition was getting stiffer, especially from WFMT, so a new programming format was organized and ads were solicited. The station appeared to be on the upswing with a new and free program guide being distributed to listeners upon request, but this was discontinued a couple of years later because of financial reasons. As of 1970 the station boasted of a library of more than 10,000 classical recordings; all-in all, it had over 200,000 individual titles which included, besides local-national recordings, many international and out-of-print selections. As a listener to WEFM quite frequently by 1970, I assumed that the station was in good hands and doing a fine job-one which could, of course, be improved upon, but nevertheless, acceptable by a relatively large listening audience in the Chicago metropolitan area. However, the problems were looming just beyond the horizon, appearing in the spring of 1972 in the form of the proposed sale and eventual change of the classical music programming format to one of rock and roll.

Thus, the sounding went out to begin the battle to save WEFM from becoming what was evident virtually to everyone on Chicago, just another rock station. By the early 1970's rock and roll was invading with force the so-called good-music (background) and classical music sanctuary, and thus FM channels were bringing higher prices with more commercials appearing on shows appealing to a larger and generally younger audience. In fact, it was this audience that Alexander Tanger, President of GCC, must have been eyeing when negotiations were in their serious stage with Zenith in early 1972 to purchase WEFM. FM stations were being sold for one and two and in some cases later especially, three million dollars in large markets as Chicago. For instance WKFM, a background (good music-type) station became WFYR, a rock operation and WMAQ-FM, a similar type of outlet changed call letters to WJOI (still NBC owned) and became a canned (automated) rock station. All this and other changes were going on while Tanger and GCC were seeking to change WEFM into still another FM rock operation. Still the end is not in sight until more of the FM band erodes into much of the same offering which can be heard on AM. Since automobiles will be required soon to be equipped with FM as well as AM if a radio is included, the numbers of listeners will go up dramatically for FM stations throughout the nation, thus making the medium even more profitable than ever. This, in turn, will cause an even faster rush to provide programming for that 18-35 year-old audience Tanger undoubtedly wished to reach when he began negotiations for WEFM in 1972. The fight to keep WEFM a classical music station has taken on far greater implications than originally it did when the crusade began in 1972. Already, the WEFM case had been dubbed a landmark case, one with national significance, one which could easily help to affect the programming practices of all stations in the nation. The fight for programming balance, serving all tastes and needs so far as this is practical, is one which must involve all citizens of all areas of the nation and not just those of Chicago and a few locales concerned with a few isolated stations' programming practices such as those of WEFM. Hopefully, by the time the Save-WEFM case has been resolved there will be a greater awareness of the generally sad state of American radio programming, mainly concerning variety and content.

BEST COPY AVAILABLE

THE SAVE--WEFM CASE AS REPORTED TO THE 50TH ANNUAL NAEB CONVENTION, 1974

BY SAMMY R. DANNA, PH.D., LOYOLA UNIVERSITY OF CHICAGO

THE SAVE-WEFM CASE FROM THE PRESENT, LOOKING TO THE PAST

The U.S. Court of Appeals of the District of Columbia Circuit recently stated: "This Court's role as the sole forum for appeals from FCC licensing decisions impels us to add a further comment on the Commission's approach to the public interest in matters of format, and what it termed 'ominous threat of a hearing.'" The statement went on the relate that the six FCC Commissioners who had voted in December, 1972 and April, 1973, to deny consideration and reconsideration, on respective votings, rendered an analysis in the latter case in apparent error. The court further related that the FCC believes that entertainment program formats are a matter best left to the discretion of the licensee or applicant, because "as a matter of public acceptance and economic necessity, he will tend to program to meet the preferences of the area and fill whatever void is left by the programming of other stations." This rather important statement is part of the October 4, 1974 U.S. Court of Appeals for the District of Columbia Circuit Rehearing *en banc* of the petition by the Citizens Committee to Save WEFM, Inc. against the Federal Communications Commission, GCC Communications of Chicago, Inc. [a Boston-based firm] and the Zenith Radio Corp. of Chicago-for a public hearing on the sale and change of the classical music format to rock (of WEFM, Chicago). Continuing with this line of argument in their decision the judges said: "But this analysis is not applied uniformly by the FCC, which distinguishes entertainment fare from other services, such as news and public affairs coverage, as to which the FCC 'require[s] that broadcasters conduct, through surveys designed to assure familiarity with community problems and then develop programming respective to these needs.'" The Court further added: "In this way, the FCC has attempted to strike a banalce between free competition in broadcasting and the reasonable restriction of that freedom inherent in the public interest standard. [*FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940)]." The U.S. Supreme Court made it clear, recently, that the public interest to be served under the Communications Act is that interest of the listening public in the "larger and more effective use of radio."

One of the important aspects of the Citizens Committee to Save WEFM fight has been the claims by Zenith that it lost large sums of money while operating WEFM as a strictly commercial venture from 1966 to 1972 (the station was sold on January 10, 1973 to GCC). Believing that Zenith had made a sort of half-hearted effort to make the station succeed financially, the legal staff began focusing attention on such claims. However, especially without financial documents such was difficult for us to probe and prove. So, the Court wrote these comments: "The [Citizens] Committee did not itself base its disputation of the losses on Zenith's financial reports because, it says, the FCC considers such reports confidential and would not have given the Committee access to them had a request been made. In these circumstances, it is fundamentally unfair for the FCC to dismiss the Committee's challenges to Zenith's claim of losses because the Committee 'neither alleged any facts which would cast doubt on the reliability of the losses claimed by Zenith in the operation of WEFM nor has it seriously questioned these figures.'...Until these questions are resolved, there is simply no basis for which the FCC can infer that WEFM's classical music format is financially nonviable [*See Progressive Rock, supra*]."

Throughout the WEFM case, I have been very skeptical about the required (by FCC) of the "community survey supposedly to determine people's needs in

BEST COPY AVAILABLE

a given city when a new licensee is coming in with a purchased or new station on the air. The idea is to determine what the people need and then program entertainment, news and most importantly public service offerings to fulfill such needs. Supposedly, based on the survey, the new licensee would determine the type of programming he feels will best fulfill the needs of the people. When GCC was negotiating with Zenith the purchase WEFM in 1972, such a survey was made in Chicago, and GCC came to the conclusion that young adults from 18-35 should be served, an audience GCC discerned was in greatest need of public service. In "discovering this information" GCC concluded that the type of entertainment fare such an audience best liked was rock and roll music. Thus, in order to serve them best with entertainment and certain public service boradcasts (mostly bunched on Sunday morning and evening), rock music was decided upon for the new WEFM format, replacing classical music programming. Now, since the biggest advertising market, currently, is that which serves young people between 18 and 35, WEFM's new owners would receive a "double bonus," serving a young audience and receive the highest possible returns for their investment through advertising. It is hardly likely that GCC came from Boston to Chicago to seek out the most public-spirited projects it could initiate for Chicagoans and just happen to arrive upon rock music for young adults-the very catagory ad agencies are looking for in parceling out their clients' messages in the radio medium. The more I think about this, the more I disbelieve it.

The Court really latched onto this "community survey" situation-which had not been discussed in any detail in the June 13, 1974 Oral Arguments session before the ten judges meeting *en banc* in Washington, D.C. In its October 4, 1974 opinion, the majority judges stated: "In seeking recommendation by the Commission, the [Citizens] Committee asserted that GCC had deliverately misled the FCC about its intentions to change WEFM's format. GCC represented that it approached the question of format with an *open mind* [emphasis added] and then, on the basis of its community needs survey, determined to direct its programming to young adults, the group it considered most in need of service. Having made that decision, it first set out to determine how best to reach that audience and discovered that a rock music format would be the best vehicle for doing so. Thus, it did not inform community leaders interviewed at the outset of this process that it would change WEFM's format to rock music because it had not yet then determined whether to change the format at all. There is a fact introduced by the Committee that casts some doubt on the bona fides of GCC's representation. The Committee, it will be recalled, inquired of and received answers from a number of community leaders that GCC had surveyed about community needs and problems. Five of the twenty-four who answered the Committee's inquiry stated that they had been told that there *would* be a format change once GCC became the licensee of WEFM, and one recalled being told specifically that the new format would be rock music." The Court continued: "This situation is covered by what we said in *Citizens Committee of Atlanta* (at 271) [*Citizens Committee to Preserve the Voice of the Arts in Atlanta (WGKA-FM) V. FCC*, 436 F.2d 271 (F.C. Cir. 1970)], where it was urged that discrepancies of exactly this sort demonstrate actual misrepresentation on [the applicant's] part which disqualifies it from being a licensee....Confusion, conflict, misunderstanding, obscurity-all are inherent in a process in which the statements and opinions of one individual are sought to be determined from what two adversary parties say that he said....The truth is most likely to be refined and discovered in the crucible of an evidentiary hearing; and it is precisely a situation like the one revealed by this record which motivated Congress to stress the availability to the Commission of the hearing procedure. *A hearing is equally in order on the question of misrepresentation in this case.*" [Emphasis added by author].

BEST COPY AVAILABLE

At this point I would like to go back to the beginnings of the Save-WEFM fight in the summer of 1972 and allow you to see what had developed from that time to the October 4, 1974 U.S. Court of Appeals 8-2 decision *en banc*, forcing the FCC to hold a public hearing on the issue. On June 6, 1972, Alexander Tanger, President of GCC, came to Chicago with his counsel, Paul Dobin, to try to persuade the then infant Citizens Committee to Save WEFM (not yet incorporated) to change its mind and allow him to continue, unimpeded, his plans to purchase and convert WEFM into a rock operation. We were told that Tanger would aid the weakest of the three classical music stations in Chicago, WNIB, giving it better broadcasting equipment and the WEFM record library, even the "WEFM" call letters (subject to FCC approval which was subsequently *not given*). We were generally being talked *down* to by Dobin especially; many of the Citizens Committeemen felt he was quite discourteous, even obnoxious. The meeting ended with our group more determined than ever to carry the fight to its ultimate conclusion. None of us had any idea that more than two and a half years later we would still be in the midst of the Save-WEFM crusade. Nevertheless, neither did he have any idea that our case would become history-making, a landmark legal entity, and a national undertaking which could easily contribute to possible monumental programming practices changes in radio, even television.

On June 26, 1972, Booth, on behalf of the Citizens Committee, filed the first document with the FCC, "Petition of Citizens Committee...to Deny Sale of Station WEFM for a Public Hearing." There were, as expected, relplies from Zenith and GCC, and, in turn, these were answered by Booth, July 27, 1972. It was stated that the listeners' rights were being violated when WEFM was sold without a public hearing. (The deal for the sale was not concluded until January 10, 1973). The FCC reached its heart-breaking decision on December 13, but did not release it until December 21, 1972-a truly sad Christmas present for all of us Save-WEFM backers. The decision said, in part: "...we find that the Petitioner [Citizens Committee to Save WEFM] in this pleadings had failed to raise substantial or material questions of fact that would show that a grant of this application would not be in the public interest." Carrying on the fight, Booth issued to the U.S. Court of Appeals in Washington, on January 18, 1973, our "NOTICE OF APPEAL" of the FCC's decision, denying us a public hearing on the WEFM case. On January 22, another document was issued, this time to the FCC, entitled: "PETITION FOR RECONSIDERATION" of the denial of a public hearing. Our opposition sent their protests to the reconsideration petitions, and our lawyer, in turn, answered them, (one of Booth's major filings being February 21, 1973.) It was around this time that the Chicago press-never playing up this controversy as we had hoped-showed its greatest concern with articles from such publications as: *Chicago Journalism Review, Chicago Tribune, Chicago Daily News, Chicago Sun-Times, and Chicago Today* (latter ceased publication in September, 1974). Publicity was generally so bad that we had to take out ads in local Chicago papers in order to reach the general public for support. The radio-TV media were not much better than their print cousins, although we did obtain, among other things, time on a couple of long talk shows (WGLD and WBBM-FM).

By this time, in early 1973, Richard Watt and his associate, Thomas Allison, joined Booth to swell our legal staff to three lawyers. On March 16, 1973, a document was filed with the U.S. Court of Appeals in Washington, D.C.: "MOTION FOR EMERGENCY HEARING ON MOTION FOR STAY, INTERLOCUTORY INJUNCTION AND OTHER RELIEF," and a second entitled: "EMERGENCY MOTION FOR HEARING, RESTRAINING ORDERS, STAY, AND INTERLOCUTORY INJUNCTION ORDERS AND OTHER RELIEF."

BEST COPY AVAILABLE

The first document is a quite brief one, only two-pages in length, outlining the major issues, almost in what I would term "headline style," and concluding that the Zenith Radio Corporation and GCC Communications should be forced to maintain the WEFM classical music format until further notice of the Court. A far more extensive and complete treatment of the case could be found in document number two, outlining the major arguments in the Save-WEFM case, giving much historical and other basic background material and listing a large Appendix. It contained information on the Wendall Phillips High School (Chicago) aid received in a financial campaign to send the school's A Capella Choir to Europe for a musical festival in 1970. WEFM was instrumental in getting the money for the group by its on-the-air appeals. In summary, it was the intention of the Appendix to show the real worth of WEFM as a classical music station and promoter of classical music performances. This second document asked for a "STAY ORDER" to direct Zenith and GCC to keep WEFM as a classical music outlet.

Nevertheless, we of the Citizens Committee to Save WEFM and other Save-WEFM backers were treated to yet another humilation from the FCC when the Commission on March 22, 1973 issued its denial of reconsideration for a public hearing. Our lawyers filed with the U.S. Court of Appeals in Washington, a document opposing the FCC's refusal of reconsideration of a plea for a public hearing on the WEFM case, naming GCC and Zenith as "Intervenors." The lengthly document outlined the Citizens Committee;s right to have a public hearing since substantial question of violation of the public's rights was involved. Included in the Appendix of the March 28 document is an outstanding research pirce by Dr. Donald J. Bogue and his staff of the University of Chicago Community and Family Services Center. The extensive survey concluded that turning over WEFM to GCC for conversion into a rock music outlet would cause severe damage to the variety of musical programming in the Chicago area.

The U.S. Court of Appeals in Washington came through what can only be termed an "eleventh hour" document offering "RELIEF" for the Citizens Committee's cause in a document simply entitled "ORDER," This was a 2-1 decision, stopping WEFM from becoming a rock operation under its new call letters, WICV. (Zenith had completed the deal to sell WEFM to GCC on January 10, 1973 for approximately a million dollars.) For a change press coverage was fairly good, notably the story related by Pulitzer Prize broadcast columnist, Ron Powers, in the *Chicago Sun-Times* of April 9, 1973, entitled: "Bury My Mozart--No Way, Man!" Mike Royko, nationally syndicated columnist for the *Chicago Daily News*, in his April 16, 1973 column discussed the merits and demerits of WNIB and its designation by GCC as successor to WEFM as a "good" classical music station in Chicago. An additional document, an amplification of the "STAY ORDER" proposition was filed by Booth and Watt on April 16, 1973: "APPELLANTS REPLY TO MOTION OF GCC-CHICAGO FOR CLARIFICATION AND OR MODIFICATION OF APRIL 6, 1973 STAY ORDER." The U.S. Court of Appeals in Washington on April 23, 1973, issued the document requiring GCC to continue exactly as in the past the WEFM classical music broadcasting schedule, with no significant change in style and quality, until further notice; this document was simply entitled: "ORDER." A massive two-volume "APPENDIX" was jointly filed as an effort of the Citizens Committee, Zenith and GCC legal staffs on April 27, 1973 as a benefit to the U.S. Court of Appeals and its dealings with the increasingly Save-WEFM case. This contained major legal documents, the GCC "Communith Leader Survey" and other materials significant to the case. Booth and Watt filed still another document on May 16, 1973, a comprehensive 70-page review of the issues presented for review of the Court of Appeals. Among the many arguments offered in this presentation, one stated that the FCC failed to live up to the interest, convenience and necessity of the public.

BEST COPY AVAILABLE

The fall of 1973 was an active time in which the Citizens Committee released the Bogue survey in printed form: *The Radio Audience for Classical Music: The Case of Station WEFM, Chicago, Summary Report* [Published by Communication Laboratory, Community and Family Study Center, University of Chicago, $1., 30 pp.]. The Citizens Commiteee sent out mineographed bulletins, informing the Save-WEFM backers of the progress of the case; this was especially valuable since the local media gave so little publicity to the classical music cause. The FCC was sent a Citizens Committee legal document on October 31, 1974, entitled: "Petition of Citizens Committee to Save WEFM-FM, To Deny Renewal of Broadcast License for Station WEFM-FM for a Public Hearing...." I had felt strongly that such should be sent, for we were at a very low ebb and anything we could use to stall for time could probably be in our favor. Booth needed little encouragement in this area (and possibly would have sent the document without my strong backing) and prepared the license renewal denial petition. I signed it in front of a notery public, stating that to the best of my knowledge all statement contained within this document were true. I was visiting Booth's law office at least once a week to see what was happening in the case and to discuss possible strategies. I was also doing considerable research in the area at the time, such as looking into all past radio cases before the FCC which might have a relationship to the Save-WEFM crusade, and some success was realized here. On October 10, 1974, I released a 44-page paper entitled *A Comparison of the Programming of the Three Chicago Classical Music FM Stations with Emphasis on WEFM.* Numerous copies of this major research project were released to Citizens Committee members, and Booth especially wanted it for probable future reference in preparation of legal documents.

November 15, 1973, was a very sad day for the Save-WEFM backers, for the U.S. Court of Appeals in Washington, D.C. refused to order the FCC to hold a public hearing and also to order the management of WEFM to continue its classical music format much longer. Judges Robb and Bazelon dissented and Senior Circuit Judge Fahy voted in our favor. Such an unfavorable ruling came as a real shock to me, Booth and Dr. Bogue, especially. In fact, Dr. Bogue and I were meeting at Loyola University with my department chairman concerning Loyola's participation in the then newly proposed Chicago Fine Arts Broadcasting Assn. This operation consists of members from major universities of Chicago and other civic-minded groups such as the Chicago Public Library. Its primary goal is to take over ownership and operation of WEFM as a classical music station on a not-for-profit basis. Concerning the unfavorable ruling, we felt very strongly that not only was it wrong, per se, but was a very misguided one in that our principles of programming variety and excellence in programming were not properly understood. Note this majority ruling quote: "Danger lurks in government regulation of what music can be put on the airways." It appeared that the two judges were acting in fear that what was taking place in government at the time relating to media control and muffling expression over the media. Next, we had two choices: one to go to the U.S. Supreme Court in our appeal or to appeal to the U.S. Court of Appeals *en banc*. We chose the latter course of action, and it proved to be the right one, as was seen by the October 4, 1974 8-2 decision in our favor, ordering the FCC to hold a public hearing on the WEFM case. It is interesting to note that all three judges were among the ten judges in the *en banc* hearing, with Fahy continuing to vote in our favor, Bazelon coming over and voting in our favor in a separate concurring opinion, but Robb joining MacKinnon as one of the two voting against us. The impact of the full U.S. Court of Appeals hearing a case-such as ours-is considered in legal circles to be a great one, indeed, and this force is most welcomed in this lengthly case.

BEST COPY AVAILABLE

Representatives from several major universities and civic-oriented organizations met on November 20, 1973, in the Chicago Civic Center in the offices of the Mayor's Committee for Economic and Cultural Affairs to organize an association, designed to take over and operate, permanently, WEFM as a classical music station on a not-for-profit basis. The plan was to have the organizations involved in this project to own, jointly, the classical music station for the purpose of keeping its present, but vastly improved, programming format. Those representing the universities came either from schools of music or departments of communications; these institutions included: University of Chicago, University of Illinois-Chicago Circle, Loyola University of Chicago, Northwestern University, Roosevelt University, and later, DePaul University. Also included in the proposed new corporation were the Chicago Public Library and the Mayor's Committee for Economic and Cultural Affairs (Chicago). The creation of this organization was the idea of Dr. Bogue of the University of Chicago with much encouragement and cooperation coming from the City of Chicago. I was elected Acting Chairman at the November, 1973 meeting and re-elected to that position on April 24, 1974 in another Civic Center meeting. Dr. Bogue and I visited either together or separately each of the divisions concerned with the above institutions during the first part of 1974, asking personally, for their help and cooperation in forming the new association to take over and operate WEFM, jointly. We got almost unqualified cooperation and support for this undertaking from everyone concerned. Finally, after having drawn up the by-laws and the intent for forming the organization, I submitted, through our attorney, the name of "Chicago Fine Arts Broadcasting Assn." and the necessary documents for not-for-profit Illinois State corporation; such was granted on October 1, 1974. This group is doing all it can to cooperate with the Citizens Committee to Save WEFM, (I still remain actively on that corporation's Board of Directors)-to win the legal battles and eventually take over operation of WEFM.

The Citizens Committee's attorneys, Booth and Watt (with assistance from Thomas Allison of Watt's law firm), filed a petition on December 5, 1973, for a hearing on the Save-WEFM case, *en banc*, before the U.S. Court of Appeals in Washington, D.C. The petition stated that the three-judges in that Court had, like the FCC, "abandoned to the forces of the marketplace, the public's interest in 'the ability of (a) licensee to render the best practicable service to the community reached by his broadcasts . . [*National Broadcasting Co. v. United States*, 309 U.S. 470, 475]." It was further contended (under other headings) that the Court had overlooked arguments of substance, undercut the standards prescribed in its own divisions, and had misapprehended the proper statutory role of the FCC in making determinations as to the public interest, convenience and necessity area of the Communications Act. The Atlanta case was quoted in part: "...the question is...what are the community needs and will they be properly served by the proposed transfer.?" [141 U.S. App. D.C. 109; 436 F2d 263, 272 fn. 7]. The argument was also advanced that there should be balance in programming, and more specifically, there should be greater choice in particular radio formats in areas of proportionately greater population. Thus, Chicago should have more than, say one or two classical music stations, where such a number might be quite adequate for smaller communities throughout the nation. I had long advocated that such a criterion be applied to the WEFM case.

Our attorneys received on December 7, 1973, a document: "Joint Statement of Intervenors Concerning Appellants Motion for Emergency Extension of Time and Joint Motion of Intervenors to Vacate Stay." To this the Citizens Committee attorneys simply asnwered: "The motion to vacate the STAY should be denied." This STAY ORDER refers to the Court's ORDERS issued during April, 1973, stating that WEFM should remain a classical music operation with the very same quantity

BEST COPY AVAILABLE

and quality of programming exhibited by Zenith Radio Corp. when it operated the station, prior to its January 10, 1973 sale to GCC Communications. To this December 7 petition, Booth and Watt replied in strong opposition to such a proposition. Fortunately for us, on January 8, 1974, the U.S. Court of Appeals in Washington, denied the GCC-Zenith joint request to allow WEFM to vacate the above-mentioned STAY ORDER. This forced the new owners of WEFM, GCC Communications of Chicago (Boston-based) to continue, unchanged, the exact same classical music format as had been aired under Zenith's ownership.

The greatest Court victory we had gained to this time was that of January 14, 1974, in which the U.S. Court of Appeals in Washington, announced, unanimously, that the entire Court would hear (*en banc*) the Citizens Committee's pleas for a public hearing on the WEFM case. The date for that presentation was later announced as June 13, 1974. This hearing was approved by these Court of Appeals Judges: Bazelon (Chief Judge-and one voting against us on November 15, 1973), Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon and Robb (the latter two eventually voting against us in the *en banc* hearing of June 13, 1974), Wilkey and Fahy. Thus, the November 15, 1973, ORDER was *vacated* and the Save-WEFM crusade had a completely new lease on life. By early January, it was determined that much more money would be needed to carry on the fight in the *en banc* hearings, so plans were made for obtaining such funds which paid for personal expenses of the attorneys' travel to and from Washington, excluding-to be sure-even nominal legal fees. During the the long period of waiting for the public hearing GCC and Zenith made an attempt to get the date pushed up because they claimed WEFM was losing a great deal of money, and thus, the sooner the hearing was held the sooner possible "Relief" could be realized. The old argument of losing money had been given by Zenith, in the first place, as a major reason for selling the station. This petition was denied by the Court and the original date of June 13, 1974, remained. When I was invited to speak to the Communications Law classes at the University of Kansas in April, 1974, I grabbed at the opportunity, for we can always use publicity in the Save-WEFM crusade. The Kansas visit proved to be a very worthwhile experience, for more individuals discovered the case, and to the best of my ability, I felt we had a virtually unanimous agreement with our case from those students and faculty with whom I came into contact.

The hearing in Washington, D.C. before the entire U.S. Court of Appeals is, in itself, an unusual occurrance in the realm of jurisprudence, being granted only for exceptionally important appeals. As Booth had once said to me in his office, oftentimes, the judges use such an occasion to make some unified broad pronouncement on the subject under consideration; he felt such would take place in our case; eventually, when the ruling was handed down, this happened. Booth had advanced his familiar argument that 99.5 MHz on the FM band should be set aside in Chicago for classical music on an exclusive basis. GCC attorney, Dobin, also used an old argument of his, to the effect that WEFM has been a consistent money-loser under the classical music format, that since there are two other classical music stations in Chicago therefore, WEFM should be allowed to change its format to rock music and hopefully make a profit. According to observers from the Citizens Committee, notably President Vern Boerman, present at the oral arguments of June 13, 1974 in Washington, the whole mood of the Court of Appeals seemed to be favorable to the Save-WEFM group. The only exception seemed to be Judge Robb (who later dissented in our favorable opinion, along with Judge MacKinnon). One of our attorneys, Richard Watt, argued that this case did, in fact, have material issues-contrary to FCC rulings-and that the Judges should so declare this to be the case. He further argued that when there is an apparent conflict between private broadcasting interests and public interest,

BEST COPY AVAILABLE

the weight should go to the public interest side, and that this should especially hold true in asking for public hearings in such matters. "The balance should always be struck in favor of a public hearing," Watt asserted. Judge Lowenthal asked the FCC attorney, John Volpe: "Doesn't Zenith's own application [for station license] maintain there are different types of classical music? We must take judicial note that there is such a thing as classical music variety." Judge McGowan reminded Volpe that the FCC was the custodian of all broadcast channels and thus had to take into account the public's interests. He also said that if the record had established that a classical music station is not economically sound, that is the end of the station, but *that very thing* is an issue in the hearings. Judge Wilkey questioned the sources of the supposed WEFM losses, where the proof of such losses rested-in Zenith? He also hit upon an extremely important consideration, that is that there is a vast difference between saying that there is *less profit* in classical music than in rock music and also saying that classical music is simply unprofitable and rock music is profitable. I had contended this for years in the Save-WEFM case, so did the other Citizens Committee members; we felt that WEFM could make a small profit or at least break even on expenses, but the real issue in the purchase was to turn over the station to rock music, that programming format presently bringing in the most money in the 18 to 35-year old group of listeners. Judge Lowenthal also brought up another vital question concerning transferring a station license, asserting that the purchaser of a station is truly a *new entrant*, and that the FCC should be taking a *much closer look* at such proposals. Booth blamed the FCC's lack of proper regulation and interest for the erosion of the nation's classical music stations to a mere 30 among well mover 7,000 FM and AM outlets in the nation. The Judges, as a whole, seemed to be keenly aware of numerous neglects in FCC actions, and of abuses among many broadcasters; this was a very encouraging sign to all of us. Thus, we were very optimistic that we would win the Court's decision, and Booth and I had predicted by an 8-2 or 7-3 margin; the former was the eventual outcome in our favor.

The big 8-2 decision came from the U.S. Court of Appeals on October 4, 1974, ordering the FCC to hold a public hearing in the Save-WEFM case. This is the very thing we had asked the FCC go grant as early as June, 1972, but we were twice refused, and once refused by the three-judge Appeals Court in November, 1973. In our favorable decision the previously-mentioned *Atlanta* case was repeatedly referred to by the seven majority-opinion Judges (one Judge, Bazelon, issued a separate concurring opinion with the majority). The major item here was that in the *Atlanta* case the Appeals Court advocated that the FCC *does*, in fact, have *some* responsibility-under the public interest mandate-for *programming content*. The FCC had generally stayed away from such areas because it claims that it is *not* "an arbiter of taste." The court felt differently, stating that the Congressional contemplation is that the FCC should seek to assure that-within reasonable technical and economic constraints-as many as possible of the various programming formats preferred by different groups of people should be preserved. The judges,referring to the *Atlanta* decision, pointed out once more that where there are numerous radio stations (such as in Atlanta, Chicago and other large urban centers), that various tastes of the public can all be satisfied as a rule and within reasonable limits. Concerning finances, the Judges in our case asserted: "The question is not whether the licensee is in such dire financial straits that an assignment should be granted, but whether the *format change* should be granted. Once a format change engenders 'public grumbling [of] significant proportions,' the causal relationship between format and finance must be established, and if that requires the resolution of substantial factual questions...then a hearing must be held." The court then mentioned the *Lakewood Broadcasting Service, Inc. v.*

BEST COPY AVAILABLE

FCC as well as the *Atlanta* case, noting that the public interest is concerned with a diversity of broadcast formats, and thus, the elimination of a unique and distinctive format may "deprive a significant segment of the public of the benefits of radio...." Therefore, the FCC must consider, in a station transfer case, whether or not the public will suffer by a format change.

Concerning financial losses claimed by Zenith(while it owned WEFM and used in GCC arguments later after it purchased WEFM in 1973), the Court stated that since the Citizens Committee did not have access to Zenith financial records (kept confidential by the FCC), "it is fundamentally unfair for the FCC to dismiss the Committee's challenge to Zenith's claim of losses because the Committee 'neither alleged any facts which would cast doubt on the reliability of the losses claimed by Zenith in the operation of WEFM nor has it seriously questioned these figures.'" The question of the FCC-required public hearing has been a sore spot with the Citizens Committee. This is supposed to be a community needs survey of so-called leaders in a given area (more than 100 were surveyed). The new station or transfer station is then supposed to program alleged public service presentations to meet such needs. Based on this survey, the station is also supposed to program to meet the entertainment desires of the audience to which it is aiming its public service materials. Well, GCC found the greatest needs for public service in Chicago were in the 18-35-year old range: drug abuse, crime, etc. Thus, it determined that rock music was their choice and thus, the station should meet this form of programming desire along with public service announcements (mostly bunched in early Sunday morning and late Sunday evening times). It was just a *coincidence,* however, that this 18 to 35-year old group is the same one the advertisers seek the most to air profit-making commercials. I always contended that no one in his right mind would come into a community such as Chicago and purchase an FM station for a million dollars (a real bargain in the case of WEFM) and have a completely *open mind* as GCC claimed it had concerning the WEFM programming format. Obviously, a corporation, responsible to its stockholders, came in to make a profit, and as it claimed WEFM was *not making a profit,* and rock music aimed at an 18-35-year old audience would be the most profitable venture-thus, it is logical, reasonable and sensible that the group knew what it wanted to program *before* puchasing WEFM from Zenith and *before* making its community needs survey. The survey would merely bolster the *preconceived conclusions* that the WEFM classical music format should be changed in favor of rock, a much bigger money-maker. The Citizens Committee to Save WEFM questioned numerous individuals involved in this GCC community needs survey, discovering some questionable things about it; this was reported to the FCC and to the Appeals Courts from time to time. However, the Court stated that there seemed to be some *misrepresentation* in the GCC survey area, and stated such in the October 4, 1974 ruling. GCC at the time of this writing was appealing this accusation to the Court which made it. A U.S. Supreme Court review of the whole case seemed a distinct possibilty, also at the time. The Court was also concerned with the FCC's past policy of non-interference in programming format decisions, but its great concern for public service and public affairs programming has always existed within this area under discussion. The Commission has felt that by allowing entertainment programming to be the station owner's choice and, at the same time, lay down some public service programming rules, this would "strike a balance between free competition in broadcasting and reasonable restriction of that freedom inherent in the public interest standard. [*FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940)]. The Court made it abundantly clear that recently the U.S. Supreme Court emphasized that the public interest to be served under the Communications Act should be that interest of the listening public in "the larger and more effective use of radio."